IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, SECOND DISTRICT

RICHARD HAZEN and LYNN TRAN,

Petitioners

v. **Case No. 2D14-4833**

CITY OF HOLMES BEACH, FLORIDA
A municipal corporation,

Respondent.
_____/

MOTION FOR ISSUANCE OF A WRITTEN OPINION AND CERTIFICATION

COMES NOW, PETITIONERS, RICHARD HAZEN and LYNN TRAN, by and through their undersigned legal counsel, and pursuant to Rule 9.330, Fla.R.App.Pro., who move for the issuance of a written opinion in this cause and certification to the Florida Supreme Court. The undersigned expresses the belief, based upon a reasoned and studied professional judgment, that a written opinion will provide a legitimate basis for Supreme Court review for the reasons set forth herein.

The lower tribunal upheld the decision of the City of Holmes Beach Code Enforcement Board that Petitioners' construction of their tree house violated the City of Holmes Beach coastal setback prohibitions contained in Part III, Article VII,

Division 2, Section 7.2, Holmes Beach Code. Said code prohibits all construction within 50 feet of the erosion control line as established by the State of Florida. The only exceptions to said prohibition are seawalls, groins, revetments, dune walkovers and similar structures, the sole purpose of which is the protection, establishment, maintenance or nourishment of beach areas, or for the sole purpose of protection of existing buildings or structures from the waters of the Gulf of Mexico. Part III, Article VII, Division 2, Section 7.2.A.2., Holmes Beach Code.

The Florida Department of Environmental Protection ("FDEP"), is the State agency empowered by the Florida Legislature pursuant to Chapter 161, Florida Statutes to regulate all construction and excavation seaward of an established Coastal Construction Control Line, including structures within 50 feet of the established erosion control line. In contrast to Part III, Article VII, Division 2, Section 7.2, Holmes Beach Code, Chapter 161, Florida Statutes authorizes the construction of pile-supported elevated viewing platforms; gazebos and boardwalks; lifeguard support stands; public and private bathhouses; sidewalks, driveways, parking areas; shuffleboard courts; tennis courts; handball courts; racquetball courts; other uncovered paved areas; and any other structure which will not cause a measureable interference with the natural functioning of the coastal system, as determined by the FDEP.

Accordingly, Part III, Article VII, Division 2, Section 7.2, Holmes Beach Code prohibits what the Florida Legislature authorizes under Chapter 161, Florida Statutes.

The lower tribunal was of the opinion that the City of Holmes Beach had the lawful authority to adopt coastal construction regulations that were "more restrictive than the provisions of Chapter 161, Florida Statutes". The lower tribunal, however, failed to recognize the distinction between a local regulation being more restrictive than State law, such as a hypothetical local restriction that private bathhouses could not exceed 300 square feet, where there is no size restriction under State law, and a local regulation which absolutely prohibits structures authorized by the Legislature.

The Petitioners argued before the lower tribunal and this Court that as described by the Florida Supreme Court in its recent decision in Mansone v. City of Aventura, 147 So.3d 492 (Fla. 2014), even where the Legislature has not expressly or impliedly preempted local regulation, where the local regulation prohibits that which is authorized by State law, the local regulation is unconstitutional under the doctrine of "conflict preemption". In City of Palm Bay v. Wells Fargo Bank, 114 So.3d 924, 927 (Fla. 2013), the Florida Supreme Court held that the City's ordinance establishing a lien priority for code enforcement liens over other liens established by State law, was preempted by conflict with State law. The Supreme Court noted that although municipalities generally have the power to enact legislation concerning any

subject matter upon which the State Legislature may act, "in exercising their power within that scope municipalities are precluded from taking any action that conflicts with a state statute. In this context, concurrent power does not mean equal power".

In the present context, the City of Holmes Beach's absolute prohibition against most coastal structures "stands as an obstacle" to the FDEP's exercise of its authority under State law to allow the construction of the same structures prohibited by the City. Such a conflict between the local ordinance and State law requires a finding that the local ordinance is unconstitutional and invalid. City of Palm Bay, at 928.

In the absence of a written opinion by the Court in the case at bar, the Petitioners are precluded from seeking review by the Florida Supreme Court of this Court's affirmance of the decision of the lower tribunal which found Part III, Article VII, Division 2, Section 7.2, Holmes Beach Code to be valid, notwithstanding its direct conflict with the afore-mentioned decisions of the Florida Supreme Court on the same question of law.

The Petitioners' argued before the lower tribunal that the City of Holmes Beach should be equitably estopped from enforcing its codes against them as a consequence of the construction of their tree house. In its Final Order upholding the Code Enforcement Board's finding that the Petitioner's violated the City's code, the lower tribunal stated,

> "For the most part, the facts are uncontroverted. The record reveals that Appellant Hazen approached Shaffer [the City's Building Inspector] to inquire if a permit was required to build a tree house. Without further inquiry of Appellant Hazen's plans for a proposed tree house, Shaffer informed him that there were no city regulations regarding building a tree house. If not explicitly stated, it may have been implied that no permit was required. Appellants then designed and constructed the tree house attempting to make it as structurally sound, safe, and attractive as possible. Appellants did not submit a formal request for approval upon completion of their design to verify that a permit was not required for this type of structure in a location along the shoreline. It was not until the City of Holmes Beach received an anonymous complaint and Appellants had spent approximately $30,000-$50,000, that the City became aware of the tree house and is violations, and the subsequent litigation ensued."

The lower tribunal cited the well-known test for the application of equitable estoppel against a local government established by this Court in Town of Largo v. Imperial Homes Corp., 309 So.2d 571, 572-573 (Fla. 2nd DCA 1975). The lower tribunal noted that equitable estoppel is applicable when, "a property owner (1) relying in good faith, (2) upon some act or omission of the government, (3) has made such a substantial change in position or incurred such extensive obligations and expenses, that it would be highly inequitable and unjust to destroy the rights he acquired".

Notwithstanding the absence of any evidence of "bad faith" on the part of the Petitioners, and after reciting the uncontroverted facts which demonstrated that the

Petitioners relied upon an act of the government and incurred extensive obligations and expenses as a consequence thereof, the lower tribunal nonetheless declined to apply the doctrine of equitable estoppel for the benefit of the Petitioners. The lower tribunal's stated reason for its decision was, "the Court finds it ***unreasonable*** for Appellants to have taken this informal, verbal statement by a city official as a blanket approval to build any type of tree house – especially one so elaborate". (Emphasis Added). It is again important to note that the lower tribunal made no finding that the Petitioners did not rely in "good faith" upon the city official's statements. Accordingly, it appears that the lower tribunal modified the test as stated by this Court in Town of Largo.

While it is recognized that there are legal and practical reasons why providing a written explanation of every decision is not desirable nor feasible, in this case, a written opinion is warranted where it appears that the lower tribunal has modified the existing law regarding the doctrine of equitable estoppel. See, Judicial Management Council Final Report and Recommendations, Committee on Per Curiam Affirmed Decisions, May 2000.

In "Developments in the Law on Local Government Code Enforcement Proceedings: Quasi-Judicial Proceedings Pursuant to Chapter 162, Florida Statutes". 42 Stetson L. Rev. 681 (Spring 2013), the author noted the growing use by local

governments of quasi-judicial code enforcement proceedings, has become a "tidal wave of proceedings". With so many citizens being brought before lay boards acting in a quasi-judicial capacity, it is very unfortunate that Chapter 162, Florida Statutes is devoid of many of the rules of evidence and procedure that govern quasi-judicial proceedings under Chapter 120, Florida Statutes, the Florida Administrative Procedures Act. Said deficiency, for example, was identified by this Court in Massey v. Charlotte County, 842 So.2d 142, 146 (Fla. 2nd DCA 2003) where this Court noted, "it is necessary to fill the procedural gaps in [chapter 162] by the common-sense application of basic principles of due process".

As a practitioner who is a former Code Enforcement prosecutor for the City of North Port, and the current Code Enforcement prosecutor on behalf of the City of Punta Gorda, and who frequently appears before Code Enforcement Boards or Special Magistrates on behalf of private clients, it is very apparent that there exists a "gap" concerning the nature of evidence that may be the basis of a decision in such tribunals.

For example, Section 120.57(c), Florida Statutes provides, "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions".

On the other hand, Section 162.07(3), Florida Statutes provides, "Formal rules of evidence shall not apply, but fundamental due process shall be observed and shall govern the proceedings."

Chapter 162, Florida Statutes, therefore, is silent concerning whether hearsay evidence, unsupported by non-hearsay evidence, would be sufficient to support a finding of guilt in a Code Enforcement proceeding.

Section 120.57(1), Florida Statutes expressly provides that findings of fact in quasi-judicial administrative hearings under the Florida Administrative Procedures Act must be supported by competent, substantial evidence.

Chapter 162, Florida Statutes, on the other hand, is silent on the type of evidence necessary to support a finding of fact. Case law, however, would suggest that findings by Code Enforcement Boards must also be supported by competent, substantial evidence. See, Bencivenga v. Osceola County, 140 So.3d 1035 (Fla. 5th DCA 2014).

The question remains unresolved, however, whether hearsay alone would be sufficient to support a finding of guilt in a quasi-judicial Code Enforcement hearing under Chapter 162, Florida Statutes. In Sheriff of Broward County v. Stanley, 50 So.3d 640 (Fla. 1st DCA 2011), the Court found, "while hearsay is admissible in administrative cases to supplement or explain evidence, hearsay alone ***is not***

competent substantial evidence". (Emphasis Added). However, Sheriff of Broward County was not a case under Chapter 162, Florida Statutes, and there does not appear to be any judicial determination of the matter specifically with respect to Code Enforcement Board proceedings.

In the case at bar, the location of the subject tree house in relation to the established erosion control line, was crucial to a finding of a violation of the City's 50 foot setback under Part III, Article VII, Division 2, Section 7.2, Holmes Beach Code.

The lower tribunal noted that the Code Enforcement Board relied upon a "survey" which determined that the tree house was located within the erosion control line 50-foot setback. It is undisputed that neither the surveyor, nor anyone acting under his supervision testified at the Code Enforcement Board hearing regarding the "survey" considered by the Board. Nor is it disputed that the "survey" was found to be hearsay by the lower tribunal. Nor is it disputed that there was an absence of competent, substantial evidence to support the "survey". Nor is it disputed that the Petitioners objected to the use of the "survey" at the hearing as the basis of a finding of fact.

Over the objection and argument of the Petitioner, the lower tribunal noted in its Final Order that pursuant to Section 162.07(3), Florida Statutes, "'formal rules of

evidence shall not apply' in municipal code enforcement hearings." The lower tribunal further noted, "Along the same line, the Court observes, 'in administrative proceedings the formalities in the introduction of testimony [and evidence] common to courts of justice are *not* strictly employed.' *De Groot v. Sheffield,* 95 So.2d 912, 916 (Fla. 1957) (emphasis added). Thus, the hearsay problem is easily overcome."

Therefore, the lower tribunal upheld the finding by the Code Enforcement Board of a violation of the City's 50-foot setback solely upon the basis of hearsay, the unsigned, unsealed "survey".

Every week throughout Florida, citizens are prosecuted before Code Enforcement Boards. Petitioners believe that without a judicial decision on the subject, many citizens may be found guilty solely on the basis of hearsay evidence. Therefore, Petitioners respectfully request this Court issue a written opinion in this cause and certify to the Florida Supreme Court the following question to be of great public importance, "Is hearsay alone sufficient to support a finding of guilt in a Code Enforcement proceeding?"

WHEREFORE, Petitioners request this Court issue a written opinion in the case at bar so that the Petitioners may seek review by the Florida Supreme Court of this Court's affirmance of the decision of the lower tribunal which found Part III, Article VII, Division 2, Section 7.2, Holmes Beach Code to be valid, notwithstanding

its direct conflict with decisions of the Florida Supreme Court on the same question of law; that this Court issue a written opinion to address whether the lower tribunal has modified the existing law regarding the doctrine of equitable estoppel; and that this Court issue a written opinion in this cause and certify to the Florida Supreme Court the following question to be of great public importance, "Is hearsay alone sufficient to support a finding of guilt in a Code Enforcement proceeding?"

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a correct copy of the foregoing has been furnished by email to: James Dye, Esq., at jdye@dyefirm.com this 24th day of June, 2015.

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